Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of Consumer Bankers Association Petition for Expedited Declaratory Ruling with Respect to Certain Provisions of the Indiana Revised Statutes and the Indiana Administrative Code	)	CG Docket No. 02-278
In the Matter of Consumer Bankers Association Petition for Expedited Declaratory Ruling with Respect to Certain Provisions of the Wisconsin Statutes and Wisconsin Administrative Code	)	CG Docket No. 02-278
In the Matter of National City Mortgage Co. Petition for Expedited Declaratory Ruling with Respect to Certain Provisions of the Florida Statutes	)	CG Docket No. 02-278

REPLY COMMENTS OF THE AMERICAN FINANCIAL SERVICES ASSOCIATION IN SUPPORT OF PETITIONS FOR DECLARATORY RULINGS FILED BY THE CONSUMER BANKERS ASSOCIATION AND NATIONAL CITY MORTGAGE CO.

The American Financial Services Association ("AFSA") appreciates this opportunity to submit these reply comments in support of the Petitions for Declaratory Ruling filed on November 19, 2004, by the Consumer Bankers Association and on November 22, 2004, by National City Mortgage Co., asking the Commission to rule that certain provisions of Indiana, Wisconsin, and Florida law and regulations cannot be applied to interstate telemarketing.

As we stated in our original comments, AFSA is the national trade association for consumer credit providers. The credit products offered by AFSA's members include personal loans, first and second mortgage loans, home equity lines of credit, credit card accounts, retail sales financing and credit insurance. AFSA files these reply comments because many of its members are significant users of interstate telephone service to market their products and services, and for other purposes relevant to their businesses.

The States' Comments on the Present Petitions Illustrate the Need for the Commission To Preempt All State Laws Governing Interstate Telemarketing.

In its original Order in this proceeding, the Commission found:

> "We conclude that inconsistent interstate rules frustrate the federal objective of creating uniform national rules, to avoid burdensome compliance costs for telemarketers and potential consumer confusion. . . . [A]pplication of inconsistent rules for those that telemarket on a nationwide or multi-state basis creates a substantial compliance burden for those entities."[1]

The States' comments on the petitions make it clear that the argument between them and the Commission is not disagreement over whether their telemarketing laws frustrate the federal objective that the Commission identified: It is that the States disagree with that federal objective and believe they can ignore it in crafting their telemarketing laws. These are not cases where states are filling in gaps in a federal scheme or clarifying points that are of particular importance

[1] Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991, CG Docket No. 02-278, Report and Order, 18 F.C.C. Rcd 14014 ¶83 (2003)("FCC Rule").

to a particular state. These are cases where the states explicitly disagree with the federal policy and seek to enforce laws that are at variance with it.

Nowhere is that divergence clearer than in Indiana, where as the State concedes, the telemarketing law makes no exception for existing business relationships (EBRs) at all. The reason for this is not that the state is building upon, or within the structure created by, the federal law and rule, but rather because Indiana objects to that law and rule as being "porous." Indiana has made a different judgment about whether the level of privacy interest is the same in an existing business relationship as outside it, a different judgment about whether the need for efficient commerce contributes to a different outcome for EBRs. And because Indiana has made a different judgment, it has ignored the plain language of the TCPA that the preserve of state regulation is limited to *intrastate* calls.

Even in a state such as Wisconsin which has provisions akin to an exception for established business relationships, it is clear from the State's comments that the different and much narrower provisions of that exception result from fundamental disagreement with the federal regime. In fact the State dismisses the privacy assumptions underlying that federal regime as "outrageous" and asserts that businesses relying on the federal provisions to make marketing calls would be using "questionable pretexts."

While Wisconsin asserts that its law is consistent with the federal purpose, and hence not preempted, Wisconsin is able to make that argument only be asserting that the federal purpose is protection of privacy, without recognizing the larger purpose of balancing the consumers' legitimate privacy interests with the needs of efficient interstate commerce, which this Commission has recognized. As it happens, the Wisconsin law *does* balance competing interests, but it does so very differently than the federal law and rule. This fact is made strikingly

evident by the State's admission that its narrow "current client" exception was supported by AT&T, the long-distance carrier, seeking to preserve its interests against those of the regional operating companies providing local service. However, the federal law does not give the states the power, in their telemarketing laws, to make inconsistent judgments on the desirable balance of marketing power between long-distance and regional carriers. Similarly, Wisconsin's rejection of the federal rules permitting affiliate marketing is based on the State's contention that it need not consider (and for all that appears in its comments feels it need not make itself aware of) the limitations of federal law on activities that can be carried on in insured depository institutions as compared with those activities that must be carried on in affiliates, such as securities and insurance.

Because these States have clearly rejected the federal law and rule and the policies on which it is based, it is time for the Commission to clearly announce that state laws on interstate telemarketing are preempted by the TCPA and the Commission's rule, and that no more case-by-case petitions for preemption need be filed.

AFSA appreciates the opportunity to submit these Reply Comments and again thanks the Commission for its efforts. Should you have any questions about this letter, please do not hesitate to contact the undersigned at (202) 466-8606.

Respectfully submitted,

Robert McKew
Senior Vice President and General Counsel
American Financial Services Association